



INFORMATION TECHNOLOGY INDUSTRY COUNCIL

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

April 11, 1996

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
Room 222
1919 M Street, N.W.
Washington, D.C. 20554

Re: In the Matter of Implementation of Section 302 of the
Telecommunications Act of 1996, Open Video Systems;
CS Docket 96-46 ✓

Re: In the Matter of Telephone Company-Cable Television Cross-
Ownership Rules, Sections 63.54 - 63.58 (Terminated);
CC Docket 87-266

Dear Mr. Caton:

I am enclosing an original and ten copies of reply comments by the
Information Technology Industry Council (ITI) in response to CS Docket No.
96-46 and CC Docket No. 87-266.

Sincerely,

Fiona Branton
Director, Government Relations and
Regulatory Counsel
ITI

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The association of leading IT companies

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Before the
Federal Communications Commission

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**FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY**

In the Matter of)

Implementation of Section 302 of the)
Telecommunications Act of 1996)

CS Docket No. 96-46

Open Video Systems)

In the Matter of)

Telephone Company-Cable Television)
Cross-Ownership Rules, Sections)
63.54 - 63.58)
_____)

CC Docket No. 87-266
(Terminated)

**Reply Comments
of the Information Technology Industry Council**

Fiona J. Branton
Director of Government Relations
and Regulatory Counsel
Information Technology Industry Council

1250 Eye Street, NW
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202-737-8888

April 11, 1996

SUMMARY

The Information Technology Industry Council (ITI) respectfully submits the following comments to the Federal Communications Commission (Commission) in response to its Notice of Proposed Rulemaking on open video systems:

- The Telecommunications Act confines open video systems (OVS) to common carriers. Congress granted OVS exceptional regulatory treatment for the carefully circumscribed purpose of encouraging common carrier entry into cable service. Cable systems should not be permitted to utilize this narrow exception to evade continuing cable regulation.
- The Telecommunications Act confines exceptional OVS regulatory regime to cable service as defined in the Communications Act. OVS should be proscribed from offering information services and enhanced services. The OVS is a narrow exception to other regulatory regimes crafted for the specific purpose of encouraging common carrier entry into cable service, not a replacement for all regulation of common carriers or cable systems.
- The Telecommunications Act directs the Commission to assure that devices used to access programming offered over all multichannel video programming systems, including OVS.

- The Telecommunications Act directs the Commission to assure that OVS carriage is available on just and reasonable terms and conditions, including interconnection. ITI believes that consumer equipment interconnection is a critical element of assuring interconnection and thus just and reasonable terms of carriage.

Before the
Federal Communications Commission

In the Matter of)	
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Implementation of Section 302 of the)	CS Docket No. 96-46
Telecommunications Act of 1996)	
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Open Video Systems)	
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In the Matter of)	
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Telephone Company-Cable Television)	CC Docket No. 87-266
Cross-Ownership Rules, Sections)	(Terminated)
63.54 - 63.58)	
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Reply Comments
of the Information Technology Industry Council

The Information Technology Industry Council (ITI)¹ respectfully submits these Reply Comments in response to comments filed before the Federal Communications Commission (Commission) by other parties in the above-captioned proceeding.

I. OPEN VIDEO SYSTEMS SHOULD BE CONFINED TO LOCAL EXCHANGE CARRIERS

ITI believes that the Commission should confine the open video system model to common carriers seeking to enter cable services. Congress created a new and potentially confusing OVS regulatory regime against the overall thrust of the Telecommunications

¹The Information Technology Industry Council (ITI), formerly known as the Computer and Business Equipment Manufacturers Association, is a leading trade association of manufacturers and vendors of computers, computing devices, office equipment, and information services. The products developed and manufactured by ITI members will make possible consumer access and use of the new voice, data, imaging, and video services envisioned by the Federal Communications Commission in this and other proceedings.

Act of 1996² toward harmonized, deregulated environments in which modes of delivering comparable services were encouraged to compete on the same level playing field. The sole objective cited by Congress for this anomalous approach to OVS was to further the Telecommunications Act's pro-competitive purpose by encouraging common carriers to enter and thus compete in cable services:

First, the conferees hope that this approach will encourage common carriers to deploy open video systems and introduce vigorous competition in entertainment and information markets. Second, the conferees recognize that common carriers that deploy open systems will be "new" entrants in established markets and deserve lighter regulatory burdens to level the playing field. Third, the development of competition and the operation of market forces mean that government oversight and regulation can and should be reduced.³

None of the purposes cited by Congress would apply to cable systems, which are well-entrenched in their markets and need no exceptional regulatory treatment as an incentive to enter cable service.

The new OVS provisions confirm Congress' focus on encouraging common carrier entry into cable service. New section 651(a) describes three methods and regulatory frameworks for video programming offered *by common carriers*.⁴ New section 653(a)(1) expressly permits local exchange carriers to provide cable service in its telephone service area through an OVS.⁵ The Telecommunications Act does *not* contain any specific authorization for cable systems to re-label themselves open video systems.

²Pub. L. No. 104, 104th Cong., 2d Sess. (1996)(hereinafter Telecommunications Act).

³H. Conf. Rep. No. 458, 104th Cong., 2d Sess. 178 (1996).

⁴Telecommunications Act, sec. 302 (enacting sec. 651(a) (to be codified at 47 U.S.C. 571(a)).

⁵Telecommunications Act, sec. 302 (enacting sec. 653(a)(1)(to be codified at 47 U.S.C. 573(a)(1)).

New section 653(a)(1) would permit a cable system to “provide video programming through an open video system.”⁶ Contrary to the several comments, this provision does not constitute an invitation for cable systems to redesignate themselves as open video systems. Rather, it permits cable systems, which offer video programming over their own systems, to offer video programming over a competing OVS platform under such restrictions as the Commission may deem appropriate.

Any other interpretation would make nonsense of the core Congressional objective of encouraging common carriers to enter and compete with existing cable systems. Existing cable systems neither need nor warrant preferential regulatory treatment as a *quid pro quo* for entering new cable service. Congress’ decision in the Telecommunications Act to retain the existing cable regulatory regime would be nullified if a cable system were permitted simply to re-label its system as an OVS to avoid that regulatory regime.

New section 653(a) also expressly conditions cable system participation in OVS, whatever the nature, on the public interest, convenience and necessity as determined by the Commission.⁷ Were the Commission to construe section 653(a) as permitting cable system redesignation as OVS (with which ITI disagrees), then the Commission should

⁶*Id.* The House version would have permitted only those cable systems that had installed switching, broadband video programming delivery to seek certification as open video systems. With regard to other cable system that had not installed switched, broadband systems, the House version called for a Commission study of whether cable systems ought to be permitted to become open video systems. The focus of the Commission study was on whether the nondiscrimination and access requirements ought to be imposed on cable systems generally, not whether cable systems ought to be exempted from cable regulation. The final version left the matter wholly to the Commission’s discretion, without Congressional direction or statement of intent. This legislative history confirms that Congress was reluctant to permit cable operators simply to redesignate themselves as OVS to evade cable regulation. H. Rep. No. 104-204, Pt. I, 104th Cong., 1st Sess. 31, 103 (1995).

⁷*Id.*

limit cable system redesignation to those circumstances in which competition would be promoted and consumer interests protected. Consistent with the public interest, the Commission should:

- permit cable systems to re-label themselves as OVS only when the same region already is being served by an OVS with significant market share; and
- require a cable system that becomes an OVS to continue to meet certain pro-competitive requirements, including section 624A and 629 of the Communications Act, to prevent cable systems from using the OVS to disable consumer equipment and eliminate competition in consumer equipment markets.

II. THE OVS REGULATORY REGIME OUGHT TO BE LIMITED TO CABLE SERVICE

ITI supports comments that OVS services should be confined to video programming services, and not be permitted to encompass other services.

New section 653 permits common carriers to provide only “cable service” to subscribers within their service areas.⁸ Section 602 defines cable service as:

- one-way video programming or other programming service; and
- that degree of interactivity “required for the selection or use” of such one-way video programming or other programming service.⁹

The services permitted of an OVS therefore are confined by statute to video programming and to a limited degree of interactivity to permit subscribers to utilize interactive programming including in their cable service packages.

⁸Telecommunications Act, sec 302 (enacting sec. 653(a)(1) of the Communications Act (to be codified at 47 U.S.C. 573(a)(1)).

⁹47 U.S.C. 522(6)(B)(as amended by Telecommunications Act, sec. 301(a)(1)). The Conference Report suggests that the 1996 Amendment was intended to embrace interactive games and other information or enhanced services. H. Conf. Rep. No. 458, 104th Cong., 2d Sess. 169 (1996). Nevertheless, this amendment remains subject to and conditioned by the statutory limit that the interactivity must be required to select or use the programming offered as part of the cable service.

Under section 653, therefore, OVS services may not extend to the full panoply of information services or to telecommunications services (such as voice, data, video conferencing and enhanced services). This scope is consistent with Congress' manifest intent in the creation of the new OVS regulatory scheme. As noted above, Congress sought to encourage common carrier entry into cable service, and to provide distinct regulatory advantages in exchange for such entry. Other services offered by common carriers and other service providers remain outside of this narrow OVS exception.¹⁰

III. OVS SHOULD BE SUBJECT TO INTERCONNECTION REQUIREMENTS

New section 653(b), discussed in other comments, directs the Commission to prescribe regulations that:

prohibit an operator of an open video system from discriminating among video programming providers with regard to carriage on its open video system, and ensure that the rates, terms, and conditions for such carriage are just and reasonable, and are not unjustly or unreasonably discriminatory.¹¹

This regulatory requirement Congress imposed on OVS is derived from section 653(b)(1)(A) of the House bill. According to the House Report, “[o]ne aspect of the terms and conditions for carriage is service, transmission, interconnection, and interoperability.”¹²

¹⁰Congress made clear its intent that a common carrier creating an OVS was not to be subject to duplicative regulatory requirements, either as a cable system under Title VI or as a telecommunications carrier under Title II. Telecommunications Act, sec. 302 (enacting sec. 653(c)(to be codified at 47 U.S.C. 573(c)). This intent necessarily means that operations remaining within either of those regulatory regimes would remain subject to them. The OVS is a narrow exception to other regulatory regimes crafted for the specific purpose of encouraging common carrier entry into cable service, not a replacement for all regulation of common carriers or cable systems.

¹¹Telecommunications Act, sec. 302 (enacting sec. 653(b)(1)(to be codified at 47 U.S.C. 571(b)(1).

¹²H. Rep. No. 104-204, Pt. I, 104th Cong., 1st Sess. 101 (1995)(emphasis added).

As Congress and the Commission have recognized in other contexts,¹³ consumer equipment interconnection rights are critical to competition, full realization of the new information technology, and consumer protection. Interconnection among services becomes meaningless if equipment used by consumers to access services does not also interconnect. If OVS were permitted to restrict equipment interconnection, competition on price, features and innovation among equipment manufacturers would be stultified. Consumers also might be faced with the disabling of their existing video equipment, thrown into confusion by complex equipment requirements, and compelled to purchase additional equipment to connect to an OVS (even when switching from one cable service to another at the same location).² Ultimately, if Congress' intent to assure broadest access to emerging information services and technologies is to be achieved, competition in customer premises equipment markets must be fostered.

For these reasons, ITI favors implementation of consumer interconnection rights for customer premises equipment used for OVS service. This approach is consistent with that stated by the Commission in its Notice of Proposed Rulemaking addressing cable - telephony convergence.¹⁴ Only in this manner can the Commission fulfill Congress' intent in requiring the Commission to implement regulations that will assure "just and reasonable terms and conditions for carriage."

¹³See, e.g., Telecommunications Act, sec. 101 (to be codified at 47 U.S.C. 256); *Telecommunications Services Inside Wiring, Customer Premises Equipment*, Notice of Proposed Rulemaking, CS Docket No. 95-184, paras. 65-69 (rel. Jan. 26, 1996).

¹⁴*Telecommunications Services Inside Wiring, Customer Premises Equipment*, Notice of Proposed Rulemaking, CS Docket No. 95-184, paras. 65-69 (rel. Jan. 26, 1996).

VI. OVS ARE NOT EXEMPT FROM THE COMPETITIVE AVAILABILITY RULE FOR MULTICHANNEL VIDEO PROGRAMMING SYSTEMS

Contrary to assertions in other comments, ITI believes that OVS are not exempt from the competitive availability requirement imposed on multichannel video programming systems by new section 629 of the Communications Act.

In that provision, Congress directed the Commission to implement regulations to assure the competitive availability of set-top boxes, navigation devices, and other consumer video equipment from manufacturers and retail outlets not affiliated with multichannel video programming distributors (MVPD). If MVPD were to offer such equipment directly to consumers, section 629 requires that the charges for the equipment be separately stated and not subsidized by charges for video services. Section 602 of the Communications Act defines MVPD as all providers of multiple channels of video programming, including but not limited to cable operators.¹⁵

By imposing this requirement on all MVPD, not just cable operators, Congress intended to assure competitive consumer equipment markets for all video programming. Congress directed harmonized competitive conditions in consumer video equipment markets regardless of the mode of transmission.

Section 653(c) exempts OVS from regulations on “cable operators” -- not from regulations on MVPD -- under certain statutory requirements in Title VI.¹⁶ Section 629 is not explicitly mentioned in section 653(c), although it does appear in Part III of Title VI,

¹⁵Telecommunications Act, sec. 304 (enacting sec. 629 (to be codified at 47 U.S.C. 549).

¹⁶Telecommunications Act, sec. 302 (enacting sec. 653(c)(1)(to be codified at 47 U.S.C. 573(c)(1)).

from which OVS are exempted generally.¹⁷ Had Congress intended to exempt OVS operators from regulation as MVPD, or from section 629 explicitly, it could have done so in section 653(c) (as it did with respect to other provisions of Title VI). Congress' specific directive that all MVPD must be subject to the competitive availability requirement under section 629 accordingly should prevail over the generic exemption from regulation of cable operators under section 653.

Alternatively, if the Commission deems it necessary to reconcile these conflicting provisions and expressions of Congressional intent, then the Commission should seek to give fullest effect to both provisions, not just to section 653(c). The Commission in that event should treat the OVS exemption from the competitive availability requirement as a temporary waiver allowed under section 629(c).¹⁸ A waiver for a limited time is permitted under that provision "to assist the development or introduction of a new or improved multichannel video programming or other service."¹⁹ Such a waiver would be consistent with the Congressional intent underlying the OVS exception to cable regulation: to encourage the entrance of common carriers into and thus new cable service.

Any waiver from the competitive availability requirement should be granted for a limited, finite duration. In these initial rules implementing the OVS provisions, the Commission should set a brief, specified duration for the waiver, and re-examine the need for renewal and extension of the waiver at the end of the initial period.

¹⁷Telecommunications Act, sec. 302 (enacting sec. 653(c)(1)(C)(to be codified at 47 U.S.C. 573(c)(1)(C)).

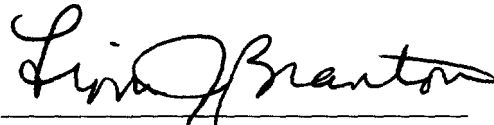
¹⁸Telecommunications Act, sec. 304 (enacting sec. 629(c)(to be codified at 47 U.S.C. 549(c)).

¹⁹*Id.*

V. CONCLUSION

For the foregoing reasons, ITI urges the Commission to effectuate precisely and narrowly Congress' intent in enacting the OVS provision: to encourage the entrance of local exchange carriers into cable service. Consistent with the statute and Congress' intent, cable operators should not be permitted to redesignate cable systems as open video systems simply to avoid continuing regulation as a cable system. Moreover, OVS should be confined to the provision of cable service as provided in the statute, and not be permitted to range into services regulated under existing and strengthened regimes. The statute also directs the Commission to assure that OVS carriage is available on just and reasonable terms and conditions, which Congress has indicated should include interconnection. To fulfill the Congressional mandate to assure the competitive availability of consumer equipment for all multichannel video programming distributors, the Commission should assure that consumer equipment connecting to an OVS are competitively available from manufacturers and retailers not affiliated with the OVS operator.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Fiona J. Branton", written over a horizontal line.

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and Regulatory Counsel
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April 11, 1996